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No. 741.

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CHARLES CLARK JUDGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

COMMISSIONER OF INTERNAL REVENUE,
Appellant,

vs.

C. C. HARMON,
Appellee.

**Motion of State of Oregon for Leave to File Brief as
Amicus Curiae, and Brief of Amicus Curiae.**

GEORGE NEUNER,
Attorney General of Oregon.

GRACE L. BOTTLER,
Assistant Attorney General,
Counsel for State of Oregon
as Amicus Curiae.

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Motion of State of Oregon for Leave to File Brief
as Amicus Curiae.

May It Please the Court:

The undersigned, as counsel for State of Oregon, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

GEORGE NEUNER,
Attorney General of the
State of Oregon,
Counsel for State of Oregon
as Amicus Curiae.

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BRIEF OF STATE OF OREGON, AS AMICUS CURIAE

I.

INTEREST OF THE STATE OF OREGON

The appellant contends that the Oklahoma Community Property Law does not authorize the filing of separate income tax returns in which each spouse may report one-half of the community income. In the petition for writ of certiorari the appellant makes the following statement:

"Moreover, a similar problem exists in Oregon for in 1943 it also adopted an elective community property law."

In view of this fact the decision of the Court in this case will create a precedent by which the Commissioner of Internal Revenue will apply the federal tax laws to the citizens of the State of Oregon, many of whom have filed their elections to apply the Oregon Community Property Law to themselves and their property.

The Oregon statute (Chapter 440, Oregon Laws, 1943) is set forth in full in the Appendix attached hereto.

The citizens of the State of Oregon have an interest in the principles of law involved in the present case common to that of the appellee, and on their behalf the State of Oregon respectfully submits this brief *amicus curiae*.

THE ISSUE

The question to be determined ultimately in this case may be stated as follows: May income falling within the definition of "community property" in the Oklahoma and Oregon acts, be reported in an equal division between the spouses in separate income tax returns?

ARGUMENT

The appellee has filed a brief in which the decisions of this and other courts pertinent to the issue presented are exhaustively cited and reviewed, and because of the similarity of the statutes involved and the position of the citizens of the two states and in order to avoid repetition, the State of Oregon respectfully asks leave to adopt the brief of the appellee, to incorporate the arguments therein made into this brief by reference, and to urge such arguments in support of its theory of the law involved controlling the determination of the issue presented herein.

The points upon which the final determination must be based should, however, be emphasized, and to that end they are hereinafter set forth.

(1) The rule to determine the issue involved must be found in the statute of the state determining the nature of the interest of the wife in the community property.

Poe v. Seaborn, 282 U. S. 101, 75 L. ed. 239.

(2) The wife has a present interest as a co-owner in the property falling within the statutory definition of community property or, conversely, the interest of the husband in such property is not exclusive of the interest of the wife.

Poe v. Seaborn, 282 U. S. 101, 75 L. ed. 239.

Bender v. Pfoff, 282 U. S. 127, 75 L. ed. 252.

Hopkins v. Bacon, 282 U. S. 122, 75 L. ed. 249.

Goodell v. Koch, 282 U. S. 118, 75 L. ed. 247.

(3) The power of management and control in the husband is in the nature of an agency for the benefit of the community created specifically by statute and not as a common law incident to ownership and, therefore, is not inconsistent with the concept of ownership by the wife.

1 de Funiak, Principles of Community Property, p 676.

Poe v. Seaborn, 282 U. S. 101, 75 L. ed. 239.

Bender v. Pfoff, 282 U. S. 127, 75 L. ed. 252.

Hopkins v. Bacon, 282 U. S. 122, 75 L. ed. 249.

Goodell v. Koch, 282 U. S. 118, 75 L. ed. 247.

CONCLUSION

Each spouse having a present interest in the property of the community each should be permitted, under the provisions of the revenue act so authorizing, to file separate income tax returns, each reporting one-half of the community property therein.

This case should be affirmed.

Respectfully submitted,

GEORGE NEUNER,

Attorney General of Oregon,

GRACE L. BOTTLER,

Assistant Attorney General,

Counsel for State of Oregon

as *Amicus Curiae*.

APPENDIX

OREGON COMMUNITY PROPERTY LAW

(Chapter 440, Oregon Laws, 1943)

AN ACT

[H. B. 208]

Providing for community ownership of property by husband and wife; providing for election to come under the act, the mode of the execution of such election and the record thereof; defining the separate property and the community property of husband and wife and the relation thereof to tenancies by the entirety and the rights of dower and curtesy; providing for management, control and disposition thereof and the rights and remedies of creditors in relation thereto; providing that either spouse may give or convey his or her interest in community property to the other or may convey his or her separate property or property held as tenant by the entirety to the community; providing for disposition of the community property on dissolution of the marriage; providing for the substitution of one spouse for the other through legal proceedings in management, control and disposition of community property; providing for the administration and distribution of the interest of a deceased spouse in community property.

Be It Enacted by the People of the State of Oregon:

Section 1. This act shall be available and apply only to husbands and wives and to their property for the period of time from the first day of the month next following the filing of their election to come under the provisions of this act until either an absolute decree of divorce is rendered dissolving their marriage or until the death of one of them.

Section 2. Election to come under the terms of this act shall be by a written instrument signed and acknowledged by both husband and wife, and shall state in substance that they desire and elect to avail themselves of the act and have it apply to them and to their property. Acknowledgments shall be in the form of and may be made before any officer qualified by law to take acknowledgments to conveyances of real property. Said instrument together with a fee of twenty-five dollars (\$25)

shall be presented to the secretary of state, who shall thereupon file said instrument, properly index the same in a book kept for that purpose and transmit to the county clerk or county recorder of conveyances, as the case may be, of each county in the state the certificate of said secretary of state, setting forth the nature of said instrument, the names of the parties thereto, the date thereof and the date of the filing thereof in the office of said secretary of state. Upon receipt of such certificate it shall be the duty of the county clerk or county recorder of conveyances, as the case may be, to file the same and to properly index the same in a book kept for that purpose. The fact of said election shall thereupon become public notice. The secretary of state shall pay the expenses of administering this act from the fees received under the provisions hereof and shall pay the balance, if any, of such fees to the state treasurer for the benefit of the general fund of the state.

Section 3. All property, both real and personal, of the husband owned or claimed by him before the effective date of the election to come under the provisions of this act and that acquired afterwards by gift, including gifts of the wife's interest in community property, by division of community property, by devise, or by descent, and also the increase of all lands thus owned or acquired, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife or liable for her torts, either before or after the effective date of said election, except as may be permitted by law as to his property prior to enactment of this act. The husband shall have the sole management, control and disposition of his separate property, both real and personal, to the extent permitted by law as to his property prior to enactment of this act.

Section 4. All property, both real and personal, of the wife owned or claimed by her before the effective date of the election to come under the provisions of this act and that acquired afterwards by gift, including gifts of the husband's interest in community property, by division of community property, by devise, or by descent, and also

the increase of all lands thus owned or acquired, shall be her separate property. The separate property of the wife shall not be subject to the debts contracted by the husband or liable for his torts, either before or after the effective date of said election, except as may be permitted by law as to her property prior to enactment of this act. The wife shall have the sole management, control and disposition of her separate property, both real and personal, to the extent permitted by law as to her property prior to enactment of this act.

Section 5. All property or moneys received as compensation for personal injuries sustained either by the husband or the wife shall be the separate property of the one sustaining such injuries and all moneys received by either spouse as beneficiary under a contract or policy of life insurance shall be the separate property of such spouse.

Section 6. The rights of curtesy and dower as now or as hereafter may be defined by law shall continue to exist in the separate property of husband and wife, respectively; but neither curtesy nor dower shall exist in or be admeasured as to community property, though the record title to said property may be in the name of either of said spouses as individuals. Tenancies by the entireties existing prior to the effective date of the election shall not be affected by such election.

Section 7. All property acquired by the husband or the wife after the effective date of the election to come under the provisions of this act, except that which is separate property of either of them, shall be deemed the community or common property of the husband and the wife and each, subject to the provisions of this act, shall be vested with an undivided one-half interest therein. The wife shall have the management and control and may convey, mortgage or otherwise dispose of that portion of the community property consisting of her earnings and all rents, interest, dividends, incomes and other profits from her separate estate and, likewise, all other community property/ the title to which stands in her name. The

husband shall have the management and control and may convey, mortgage or otherwise dispose of all other community property, subject to the limitations and restrictions otherwise provided by law. Any funds on deposit in any bank or other financial institution, whether in the name of the husband or the wife, shall be presumed to be the separate property of and may be withdrawn by the one in whose name they stand.

Section 8. The separate property of the wife and that portion of community property, the recorded title to which is in her name or which is under her management, control and disposition, shall be subject to debts contracted by the wife or liabilities of the wife arising out of tort or otherwise, but not to debts or liabilities of the husband. The separate property of the husband and that portion of the community property; the recorded title to which is in his name or which is under his management, control and disposition, shall be subject to debts contracted by the husband or liabilities of the husband arising out of tort or otherwise, but not to the debts or liabilities of the wife. The husband and the wife, and each of them, shall be entitled to such exemptions as otherwise provided by law. Both the separate property of the husband and of the wife and the community property shall be liable for debts contracted for family necessities; subject to the exemptions otherwise provided by law.

Section 9. No creditor shall have recourse to the community property for the payment of debts or liabilities created by either the husband or the wife, except as provided in section 8 of this act; provided, however, that any creditor may satisfy his claim out of the community property which was under the management, control and disposition of the spouse incurring the indebtedness or liability at the time it was contracted or created, and which subsequently has been conveyed or transferred to the other spouse and is under the management, control and disposition of said other spouse, without proof that said creditor relied upon said community property in

advancing credit, but without prejudice to bona fide purchasers, incumbrancers, or other creditors or grantees.

Section 10. The husband may give, grant, bargain, sell or convey directly to his wife, and a wife may give, grant, bargain, sell or convey directly to her husband, his or her community right, title, interest or estate in all or any of their community real or personal property. Every such deed, conveyance or transfer from the husband to the wife or from the wife to the husband shall operate to divest the property therein described of every claim or demand as community property, and shall vest separate ownership of said property in the grantee, provided, however, that no such deed, conveyance or transfer shall affect any existing claim or equity of a creditor of the grantor at the time of such deed, conveyance or transfer.

Section 11. The separate property of the husband or of the wife or property held by them as tenants by the entireties may be conveyed to the community by appropriate conveyance, evidencing therein the intention of the parties so to do.

Section 12. In the event of dissolution of the marriage, community property shall be divided between the parties by the court granting the decree in such proportions as the court shall deem just and equitable.

Section 13. Whenever the husband or the wife is non compos mentis, or has been sentenced to imprisonment for more than one year, or whenever either spouse has abandoned the other and the family, if they have dependent children, without support, or whenever the husband or the wife is an habitual drunkard, or for any other reason is incapacitated to manage, control or dispose of the community property, the other spouse may present a petition, duly verified, to the circuit court for the county wherein they reside or in which the community property or any part thereof is located. The petition shall state the name of the incapacitated spouse, a description of all community property, both real and personal, and the facts which render the other spouse incapacitated to manage, control or dispose of the community property, and pray

that the spouse filing the petition be substituted for the incapacitated spouse with the same powers of management, control or disposition of the community property as were vested in the incapacitated spouse.

Section 14. In all such cases service of process shall be had as in other suits in equity; provided, however, that where it is alleged that the other spouse is non compos mentis, a guardian ad litem shall be appointed.

Section 15. On hearing of the petition so filed, the court shall render judgment either dismissing said petition or adjudging the spouse filing the same to have such power of managing, controlling and disposing of the community property, either real or personal, as the court may deem to be just, equitable and to the best interests of the community.

Section 16. On the death of the husband or the wife, the surviving spouse may, upon petition of the court having probate jurisdiction, be appointed administrator of the community estate and upon such appointment shall administer the same in like manner as the estate of an intestate deceased person. The rights of possession of the homestead as provided by section 19-601, O. C. L. A., and to the setting aside of exempt property as provided in section 19-602, O. C. L. A., shall be preserved in such administration.

Approved by the governor March 29, 1943.

Filed in the office of the secretary of state March 30, 1943.

Becomes effective June 9, 1943.